

March 26, 2008

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

*Appeal*

Name of Petitioner: Research Focus, LLC

Date of Filing: March 10, 2008

Case Number: TFA-0247

On March 10, 2008, Research Focus, LLC (Appellant) filed an Appeal from a determination issued to it on February 26, 2008, by the Department of Energy's (DOE) Western Area Power Administration (WAPA) in Lakewood, Colorado. In that determination, WAPA responded to a request for information that the Appellant submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. WAPA released the requested document to the Appellant with some information withheld under Exemption 4 of the FOIA. The Appellant has challenged the withholding of that information. This Appeal, if granted, would require WAPA to release the information it redacted from the document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

*I. Background*

On February 12, 2008, the Appellant filed a request with WAPA for the "Power Purchase Agreement between SunEdison Corporation [SunEdison] . . . for solar electricity supplied to the National Renewable Energy Laboratory." Electronic Mail Message dated February 12, 2008, from Joseph Berwind, Appellant, to WAPA. On February 26, 2008, WAPA released the Power Purchase Agreement (PPA) with redactions. The redactions were made under Exemption 4. Determination Letter dated February 26, 2008, from Liova D. Juárez, General Counsel, WAPA, to Joseph Berwind, Appellant (February 26, 2008 Determination Letter). WAPA relied on *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) to withhold the redacted information. In relying on *Critical*

*Mass*, WAPA claimed that the information had been voluntarily submitted by SunEdison because it had been part of a negotiation of the PPA. *Id.* at 1.

On March 10, 2008, the Appellant appealed, contending that the DOE releases similar information in similar contracts. Appeal Letter dated February 26, 2008, from Joseph Berwind, Appellant, to Director, Office of Hearings and Appeals (OHA). Also, the Appellant challenges the validity of WAPA's claim that the PPA was voluntarily submitted. *Id.* at 2. Finally, the Appellant states that SunEdison has previously released to private equity firms the information the Appellant is requesting without the protection of a non-disclosure agreement. *Id.*

## II. Analysis

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir 1974). In interpreting this exemption, the federal courts have distinguished between documents that are voluntarily and involuntarily submitted to the government. In order to be exempt from mandatory disclosure under Exemption 4, voluntarily submitted documents containing privileged or confidential commercial or financial information need only be of a type that the submitter would not customarily release to the public. *Critical Mass*, 975 F.2d at 871. Involuntarily submitted documents, however, must meet a stricter standard of confidentiality in order to be exempt. Such documents are considered confidential for purposes of Exemption 4 if disclosure of the information is likely either to impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

As stated above, WAPA indicated in the determination letter that the requested information was submitted by SunEdison on a *voluntary* basis in connection with the negotiation of the PPA. February 26, 2008 Determination Letter at 1. WAPA relied on *Critical Mass* to withhold the redacted information under Exemption 4. In previous cases before this office, we have found that information that is submitted in negotiating with the DOE is "involuntarily" submitted. *B.P. Exploration, Inc.*, 27 DOE ¶ 80,216 (1999); *William E. Logan, Jr.*, 27 DOE ¶ 80,198 (1999). Because SunEdison was required to submit the agreement in negotiating the PPA with WAPA, we find that the PPA was "involuntarily" submitted. Thus, for the information to be withheld under Exemption 4, the *National Parks* test must be met. WAPA did not evaluate the information under *National Parks*, but rather it evaluated the information under *Critical Mass*. Therefore, we will remand the matter to WAPA for a new determination utilizing the *National Parks* test.

The Appellant also has argued that similar information has been made publicly available by the DOE. Appeal Letter dated February 26, 2008. Finally, the Appellant has argued that SunEdison itself has previously released the information. *Id.* WAPA should address each of these arguments on remand in its analysis of this request under *National Parks*.

### *III. Conclusion*

WAPA used the *Critical Mass* test to evaluate whether to withhold the requested information under Exemption 4. Because the information was “involuntarily” submitted, WAPA should have used the test established in *National Parks*. Therefore, we will grant the Appeal in part and remand the matter to WAPA for a new analysis and determination.

It Is Therefore Ordered That:

- (1) The Appeal filed by Research Focus, LLC, Case No. TFA-0247, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the Western Area Power Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in this Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 26, 2008